Supreme Court, U. S.
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No. 80-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES J. SELLERS, JR., and
CHARLES J. SELLERS AND CO., INC.,

Petitioners,

—against—

PHILIP D. RUPERT, JR., and
RUPERT & LUTZ AGENCY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Explanation of Abbreviations

References to the petition for certiorari are designated "P." References to the appendix to the petition for certiorari are designated "A," and references to the appendix to this reply brief are designated "B." The designation "Br." indicates references to the respondents' brief.

I

THE APPLICABILITY OF *GERTZ* IN NON-MEDIA CASES IS SQUARELY PRESENTED HERE

In an effort to avoid review by this Court, respondents have sought to obscure the clarity with which the question of the applicability of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) is presented. With respect to the charge to the jury, they contend that (a) petitioners' trial counsel waived any objection to the charge by failing to except to it and requesting an erroneous instruction, that (b) the verdict on punitive damages demonstrates that the jury found fault within the meaning of *Gertz*, and that (c) the Appellate Division made an independent factual finding of fault. With respect to petitioners' contentions regarding damages, respondents simply assert—without any support in the record—that the damage awards in fact were supported by competent evidence. All of these contentions are without merit. This case directly presents important issues that should be resolved by this Court.

1. Contrary to respondents' unsubstantiated assertions, no court below held that petitioners knowingly and intelligently waived any constitutional objections to the charge. Rather, they held only that review of the charge was barred by Section 4110-b of the New York Civil Practice Law and Rules (A1, *see* A3-4), a standard contemporaneous objection rule. (Statutory Appendix B5)

Notwithstanding CPLR § 4110-b, the Appellate Division of the New York Supreme Court may, in the exercise of its discretion, review a jury charge despite the failure to take an exception at trial. (P. 7 n.4) Where, as here, a state court refuses to exercise its discretion to review the charge in such circumstances, the claimed constitutional error in the charge is open to review in this Court. *Williams* v.

Georgia, 349 U.S. 375, 383 (1955); *see Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 299, 231-34 (1969). (P. 13 n.16) Hence, the lack of an exception to the charge is no obstacle to review.

2. The charge on liability is open to review here, despite the lack of an exception, for an entirely independent reason. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), this Court considered a claimed constitutional error in a jury charge in a libel case to which no objection had been taken at trial. In so doing, it applied *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (waiver of constitutional rights must be knowing and intelligent), in concluding that waiver of First Amendment rights will be found only in "clear and compelling" circumstances.* 388 U.S. at 145.

Respondents seek to escape from the holding in *Curtis* by asserting that the law at the time of the trial in *Curtis* was uncertain and, in any case, that there was a "finding of waiver" here. (Br. 7-9) Of course, there was no "finding of waiver" in this case—respondents in substance are asking this Court to make that factual determination. Moreover, the uncertainty in the law here was just as palpable as it was in *Curtis*. Certainly this Court has not yet determined whether *Gertz* applies in non-media cases. The failure of petitioners' trial counsel to except to the charge on liability undoubtedly was due to his assumption that *Gertz*'s fault requirement did not apply in non-media cases, an assumption we submit was erroneous. In any case, this Court should hardly assume that the failure to except was the result of a conscious decision by trial counsel—much less an informed decision by respondents—to waive any constitutional rights.

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* *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), relied upon by respondents (Br. 7-8), was a search and seizure case and does not overrule *Curtis*' holding that the knowing and intelligent waiver standard applies in civil First Amendment cases.

3. Respondents next contend that the punitive damage awards reflect a finding of reckless disregard for the truth and that the *Gertz* fault standard therefore was satisfied. (Br. 9) This contention is rebutted by several decisions of this Court.

The charge on punitive damages permitted the jury to award punitive damages if it found *either* that defendants acted "with deliberate intent to injure plaintiff, *or* in reckless disregard of the truth . . . ." (A44, emphasis added; *see also* A44-46, A67) Since there was a general verdict, it is impossible to tell whether the jury's punitive damage award rested on a finding of deliberate intent to injure or of reckless disregard of the truth. For precisely that reason, this Court repeatedly has held that verdicts based on just such charges cannot be construed as a finding of knowledge of falsity or reckless disregard for the truth. *E.g., Old Dominion Branch* v. *Austin,* 418 U.S. 264, 281 (1974); *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U.S. 6, 9-11 (1970).

As the jury's verdict did not necessarily embrace a finding of fault, the propriety of the charge on liability is squarely presented.

4. Respondents assert that the Appellate Division "made its own independent finding of fault to satisfy the *Gertz* standard . . . ." (Br. 11)

The Appellate Division concluded only that there was sufficient evidence to go to the jury under any fault standard. It did not purport to make any independent finding of fact. (A5) Its comments regarding the sufficiency of the evidence merely indicate its view that there should be a new trial—as opposed to dismissal—in the event some higher court concludes that the charge was erroneous.

That the Appellate Division made no findings of fact should hardly be surprising. That court lacks the power, as a matter of state law, to make findings different from or in addition to those made by the jury in any case triable to a jury as of right.* Any other rule would deprive the appellant of his state constitutional right to trial by jury. In light of this well-established principle of state law, there simply is no room for misunderstanding the Appellate Division's action.

5. Respondents contend that the $200,000 award to Rupert was supported by evidence in the record.** But this contention too is without merit.

There was no evidence of any injury to Rupert personally for a very simple reason. Plaintiffs tried this case, insofar as Rupert was concerned, in reliance on the common law rule that damages are presumed in cases of libel per se. As the Appellate Division said, the only witness who testi-

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* *Martin* v. *City of Albany*, 42 N.Y.2d 13, 19, 396 N.Y.S.2d 612, 616 (1977); *York Mortgage Corp.* v. *Clotar Constr. Corp.*, 254 N.Y. 128, 134, 172 N.E. 265 (1930); H. COHEN & A. KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 173, at 653-54 (1951).

** Respondents also attack petitioners for asserting that the Appellate Division found no evidence of any "actual personal damages", claiming that the quoted phrase was used only in reference to special damages. But the Appellate Division, although referring to special damages, stated: "The sole witness on behalf of plaintiffs testifying as to the measure of damages was Robert M. Morrison, who . . . testified as to the . . . value of the Rupert & Lutz Agency . . . In the absence of testimony of Rupert's actual personal damages the jury's award of $22,000 [in special damages] to plaintiff Rupert individually is without support and must be reversed." (A21)

The Appellate Division's opinions, read in context, therefore state the obvious: the *only* evidence offered by either plaintiff on damages was Rupert & Lutz's valuation expert. Hence, there was no evidence of damages to Rupert. Accordingly, the Appellate Division's statement regarding the absence of evidence of "actual personal damages" to Rupert is equally applicable to special and general damages.

fied as to damages was a valuation expert. (A21) No testimony whatsoever was offered as to any injury sustained by Rupert. Indeed, respondents in substance conceded in the trial court that they relied exclusively on the common law presumption in support of the award to Rupert. Following the trial, petitioners moved for judgment notwithstanding the verdict with respect to the award to Rupert on the ground that there was no evidence of any injury to him. In opposing that motion, respondents' counsel relied solely on the common law presumption. (B1, B3) He did not suggest that there was any evidence in the record to support the award to Rupert independent of the presumption. Since there was no evidence—merely the presumption held unconstitutional in *Gertz*—the award to Rupert squarely presents the question whether *Gertz* applies here.

6. Respondents contend also that this Court should not review the $208,000 special damage award to Rupert & Lutz because the "causation issue" on which it depends "is also in [*sic*] question of fact and has been resolved against petitioners by a jury and by two appellate courts . . . ." (Br. 13-14 & n.12)

Any determination of causation made below was erroneous because there was no evidence whatsoever from which the jury rationally could have concluded that the loss of the Medical Society account was caused by Mr. Sellers' March 10, 1971 letter.* There was no evidence that the

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* The jury probably made no finding on the causation question. Contrary to respondents' assertion (Br. 3), the charge on the libel count did not require a finding that the March 10 letter caused the loss of the account. (A39-A46) Respondents seek to avoid this error by relying on another portion of the charge (Br. 3, citing A47), but it pertained only to the interference with contract claim, which was based on matters in addition to the March 10 letter. (A47, A55, A42)

board of directors, which ratified the decision to terminate Rupert & Lutz, knew of the letter when it acted. There is no evidence that the doctor who made the recommendation knew of it at the time he did so. Contrary to respondents' suggestion (Br. 5 n.2), it was their burden to produce such evidence.

The lack of any evidence on the causation issue squarely raises the question of the applicability of *Gertz*'s damage holding to this non-media case. And this Court repeatedly has undertaken independent reviews of the sufficiency of the evidence where, as here, that is necessary to protect First Amendment rights. *E.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285 (1964); *Letter Carriers* v. *Austin,* 418 U.S. 264, 282 (1974).

7. Respondents suggest that petitioners' constitutional objections to the damage awards were waived by the failure to object to the charge on liability. (Br. 19) That assertion flies in the face of a decision of this Court.

In *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81 (1967), the defendant requested and failed to except to a charge that was inconsistent with *New York Times Co.* v. *Sullivan,* but he properly challenged the sufficiency of the evidence. This Court held that the error in the instructions therefore was not properly before it. However, the Court held that the challenge to the sufficiency of the evidence preserved that distinct issue for review, reached the merits, and reversed the judgment of the state court on the ground that there was insufficient evidence of actual malice in the *New York Times* sense.

This case is indistinguishable because petitioners' contention that there was no evidence of any damages to either plaintiff was properly presented by motion at trial. In consequence, this Court may reach that issue.

II

CERTIORARI SHOULD BE GRANTED ON THE OPINION ISSUES

Respondents' efforts to avoid review of the opinion issues is similar to their approach to the *Gertz* point. They first assert that the courts below concluded that there were no statements of opinion in the letter, as if that should put an end to the matter. They then assert that there is no issue for review here, even if there were statements of opinion in the letter, because "statements of opinion are entitled to constitutional protection only where 'the facts supporting the opinions are set forth'" (Br. 16)—a condition they claim is not satisfied here. Again, these contentions are mistaken.

1. Respondents' claim that the courts below concluded that there were no constitutionally protected opinions in the March 10, 1971 letter, even if it were true, would be only the beginning rather than the end of discussion. As respondents recognize, the characterization of particular statements as fact or opinion is a question of constitutional law. (Br. 15-16) This Court has reversed libel judgments on the ground that the alleged libels were statements of opinion, but it never has developed any principled criteria for distinguishing between fact and opinion. There is no principled distinction, we submit, between the language used in Mr. Sellers' letter here and language that this and other courts have held to be constitutionally protected statements of opinion in other cases. (P. 15-16) This Court should grant certiorari in order to consider the standards to be applied in making this critical distinction between fact and opinion.

2. Respondents seek to avoid review of the opinion issues by contending that "the March 10 letter was not based upon

facts known to the recipients" and therefore was not constitutionally protected even if it contained statements of opinion. (Br. 16-17)

The difficulty with this argument is the premise that the March 10 letter was not based on facts known to the recipients. Neither the jury nor the courts below ever made any such finding for the simple reason that the trial court refused to give the appropriate instruction.

Respondents' requested charge on opinion provided in pertinent part:

> "In the defendant's letter of March 10, 1971, it is the defendant's claim that the facts set forth therein are true and that the opinions expressed therein by the defendant are reasonably based on the facts stated therein or upon facts which were known to or assumed by [the recipients].
>
> "An opinion is not defamatory when the maker of the comment states the facts upon which he bases his opinion of the plaintiff, or when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts." (A103; *see also* A103-04)

Respondents were entitled to an opportunity to persuade the jury that Mr. Sellers' opinions indeed were based upon facts known or accurately disclosed to the recipients. But the trial court's refusal so to charge improperly deprived them of that opportunity. Respondents now seek to sweep that error under the rug by, in effect, asking this Court to assume without basis—really to determine as a matter of fact—that the March 10 letter was not based upon facts known to the recipients. This is entirely inappropriate. Certiorari should be granted to establish that it is the function of the jury to determine whether statements of

opinion are based on facts known or accurately disclosed to the recipients.

3. Whether one relies on the Appellate Division decision below, which stated that "the letter was not constitutionally protected as a statement of defendant Sellers' opinion *only*" (A17, emphasis added), or simply reads the March 10, 1971 letter, there is little doubt that at least some of the statements in Mr. Sellers' letter were statements of opinion. For example, in referring to "threats and bluffs", Mr. Sellers plainly was characterizing previous efforts by Rupert & Lutz to have the Medical Society adopt its insurance proposal—efforts known to the Medical Society. The characterizations in the letter were matters of Mr. Sellers' opinion —and a recipient of the letter testified that he so understood it.

Since the letter contained at least some opinion, and the trial court refused to instruct the jury that opinions could not constitutionally form the basis for a libel award, the verdict below may rest on constitutionally protected opinion rather than on any defamatory statements of fact contained in the letter. And respondents do not dispute that such a verdict conflicts with this Court's decisions in *Williams* v. *North Carolina,* 317 U.S. 287, 292 (1942), and *Stromberg* v. *California,* 283 U.S. 359, 367-68 (1931).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari to the New York Court of Appeals should be granted.

Dated: September 18, 1980

Respectfully submitted,

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APPENDIX K

Plaintiffs' Argument in Response To Defendants' Motions After Verdict

[Emphasis added]

MR. HARTMAN: If it please the Court, first of all I don't recall ever using the word "mock" in this summation. I don't think I did.

I would like to say that I think one point we ought to realize when this Jury brought in the verdict is that where a man is injured or where he is defamed in his trade or business, which was exactly the issue in this case, that constitutes libel per se. And this proof of any special damage may be made if you want to show special damages. But on the libel per se itself there is an assumption that his reputation has been injured and he is entitled to general damages.

Now there is also another thing in this case and that is malice. And the evidence, the series of documents admitted, in evidence, were admissible on the issue of malice, and not every document of course itself could be—could constitute a cause of action for libel, because of the statute of limitations is applied to some. But certainly all of the evidence was admitted—was admissible on the question of malice, and that was made clear I think and it was discussed right here in this courtroom.

Now, I know of no doctrine where opinions per se are protected. There is the doctrine of fair comment that a newspaper is entitled to make where it is clearly in an editorial context. Now I am not going to get into newspaper libel at all but there is a difference between any protected opinion and the kind of conduct that I think

there was an overwhelming amount of evidence to show in this case. So that there is no opinion here. These things were stated as facts, and the Jury had the right to make its inferences based on the evidence presented.

Now this—just for a moment on Mr. Morrison's testimony. Mr. Morrison came in, testified as to what he thought the value was. He qualified as an expert. The expert, Mr. Clauss, who was the Defendants' expert, testified that Mr. Morrison is an authority—those were his words—that he was knowledgeable in the field. They had—the defense had ample opportunity to develop expert testimony with respect to the damages. I point out to the Court that this case was pending for five years before it got to trial, and there was ample opportunity for discovery. And there were many, many frustrating periods in this discovery where it was necessary to put a Supreme Court Justice in charge of the discovery to insure the attendance at these proceedings. So there was ample time to prepare; if possible there could be preparation of evidence to refute the special damages.

The amount of the general damages is the amount which a Jury is entitled to weigh, based on the evidence presented. This was a lengthy trial. There was no prejudice by the way, irrespective of the manner in which 40-C of the Insurance Law may have been pleaded—may have been charged. I don't think there was any error in the charge. But in any event, any error that there could have been could not have been harmful because 40-C was charged in connection with Section 127. And the Jury came in with no cause of action under those provisions of the Insurance Law. There was no recovery made here on any provision of the Insurance Law. How can there be any error?

Appendix K—Plaintiffs' Argument in Response To Defendants' Motions After Verdict

The statement concerning an interested witness, and I think— this is the point—in Your Honor's charge you advised the Jury that they are to weigh all of the witnesses with respect to whether or not they were interested or biased or knew one, or were called as one party's witness or the other. And I think it is the standard PJI charge with respect to that, and there can't be any error. The Jury is entitled to recognize, having listened to that part of the charge which tells them, they are to weigh the relationship of each of the witnesses to the various parties in the case, that they are amply admonished, if you will, to do exactly that and to consider these relationships and the positions of these witnesses when they assess their testimony. And that charge you did give.

I don't think that—and I am not going to talk very long. I don't think there were any errors in the charge. I think that if there could have been it was cured by the fact that we were no caused on those particular causes of action. And the purpose of a Jury trial is to allow a Jury to determine. The purpose of a Jury trial in a non-liquidated damage case is to allow the Jury not only to determine liability but the effect of that liability. *We have a clear case of libel per se. We have an absolutely overwhelming amount of proof and evidence with respect to that libel per se, and based on that the Jury can determine the damages to compensate, and the cases say the mental anguish, the ridicule, the balance of the things that follow from this kind of defamation.*

We have not submitted a memorandum on this motion, and don't intend to, Your Honor, because we frankly hope for a speedy determination. We have now waited over three weeks after the verdict for these proceedings. All of

the matters briefed, have been briefed. You have had a number of briefs in this case. Maybe too many; I don't know. But a whole bunch of stuff is in there and all the law that is applicable has been presented to this Court before and during this trial. And on the basis of that I don't think that there is one bit of reason to disturb in any respect the determinations of the Jury in this case, and we ask that the verdict be sustained in the manner in which it was rendered by the Jury.

Thank you, Your. Honor.

Statutory Appendix

New York Civil Practice Law and Rules Section 4110-b provides:

§ 4110-b. Instructions to jury; objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.